In the

United States Court of Appeals

For the Ninth Circuit

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington,
Appellant,

v.

ALBERT GONZALES, *Appellee.*

No. 14245

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLANT

DON EASTVOLD,
Attorney General,

CYRUS A. DIMMICK,
Assistant Attorney General,

Attorneys for Appellant.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT, OLYMPIA, WASH.

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JURISDICTIONAL STATEMENT

On April 28, 1952, the supreme court of the State of Washington issued an order to show cause, returnable May 23, 1952, as a result of an application for habeas corpus filed by the appellee herein, Albert Gonzales, together with co-petitioners, William Giron and Cecil Coluya. Although the original

application for habeas corpus was filed pro se, counsel was later retained to present the matter in the supreme court of the State of Washington. This counsel was the law firm of Monheimer, Schermer & Mifflin of Seattle, Washington. The application for a writ of habeas corpus was denied on June 13, 1952. Subsequently, the same petitioners petitioned the supreme court of the United States for a writ of certiorari. This petition was denied on October 13, 1952. On November 7, 1952, the appellee herein, together with William Giron and Cecil Coluya, as co-petitioners, filed an application for habeas corpus in the United States District Court for the eastern district of Washington, southern division. Pursuant to an order to show cause issued by the Honorable Sam H. Driver, district court judge, hearings were held on the applications on February 5, 1953, July 14, 1953, and December 17, 1953. At the February and July hearings, the petitioners were present in court and with counsel, Mr. R. Max Etter, attorney at law, Spokane, Washington. At the December hearing the petitioners were not present but were represented by Mr. Etter. The respondent therein, the appellant here, John R. Cranor, superintendent of the Washington State Penitentiary at Walla Walla, Washington, was represented at each hearing by Cyrus A. Dimmick, Assistant Attorney General of the State of Washington. The result of these hearings was an order granting a writ of habeas corpus to appellee, from which respondent John R. Cranor, feeling himself aggrieved, filed a notice of appeal to the United

States Circuit Court of Appeals for the Ninth Circuit pursuant to the authority contained in 28 U. S. C. A. § 2253.

STATEMENT OF THE CASE

On the morning of January 7, 1950, at approximately 12:30 a. m., three men, who appeared to be oriental, drove to a position near the residence of one Fidel Molina in the city of Seattle, Washington. Within a very few minutes Fidel Molina, driving his car and alone, approached his residence. As he neared his driveway shots rang out and Molina slumped over the wheel of his car dead. The three men in the Ford in attempting to drive off became stuck in the ice and snow and each of them then left the car and proceeded away from the scene of the shooting on foot. A few minutes after this incident and some ten or twelve blocks from the vicinity of the shooting, appellee, Albert Gonzales hailed a cab. The cab driver immediately turned appellee over to the police who promptly transported him to the headquarters of the Seattle Police Department where he was placed in a cell in the jail. Later, at about 3:00 a. m. of the same morning, he was brought to the office of Sgt. Paul Foster, Homicide Division, in charge of the midnight to 8:00 a. m. shift, by Officers Kenneth W. Thomas and P. H. Ryan. After interrogation by Sgt. Foster, appellee signed a statement at approximately 5:00 a. m. in which he denied any complicity in the shooting of Fidel Molina. See Exhibit No. 1. Appellee was then returned to

his cell where he remained until approximately 10:30 p. m. on January 7, 1950, or about 21 hours after his arrest and about 17 hours after signing the first statement. At approximately 10:30 p. m. on January 7, 1950, appellee was taken to an interrogation room by Detectives Austin W. Seth and Don Sprinkle. He was interrogated by these officers until approximately 2:10 a. m. at which time he signed a full confession of his activities with regard to the shooting of Fidel Molina, and implicating Cecil Coluya and William Giron. See Exhibit No. 2. The confession was written in longhand by Detective Don Sprinkle and read and corrected by appellee, Albert Gonzales. Subsequently Cecil Coluya and William Giron were taken into custody, and on January 9, 1950, appellee together with Coluya and Giron were charged with murder in the first degree. The appellee and his co-petitioners were tried and found guilty of the crime of murder in the first degree in criminal cause No. 25721, in the King County Superior Court. During the course of the trial the two documents referred to as Exhibits 1 and 2 were admitted into evidence and submitted to the jury with the proper instructions pursuant to RCW 10.58.030, dealing with the admission of confessions in the superior courts of the State of Washington.

The question presented by the applications for habeas corpus of the petitioners, Gonzales, Giron and Coluya, was whether or not a confession allegedly "beaten" out of the appellee, Gonzales, could be used to support a conviction without violating the

due process clause of the United States Constitution. The question as presented to the federal district court by the appellee and the question which was determined was whether or not, in fact, the confession by the appellee had been extracted from him by the use of force and violence by members of the Seattle Police Department. The respondent contends that there was not sufficient proof before the federal district court upon which to base a finding that the confession had been extracted by force and violence and that the district court is without jurisdiction to act affirmatively in such a case where it is proved that the superior court of the State of Washington acted in and pursuant to the laws and procedure of the State of Washington, none of which has been found to be unconstitutional.

SPECIFICATIONS OF ERROR

1. Error is assigned to Finding of Fact No. 2, reading as follows:

> "That following said conviction the petitioners gave notice of appeal, but nothing further was done to perfect said appeal, and the same was dismissed by the Supreme Court of the State of Washington without consideration of the merits; that thereafter petitioners petitioned the Supreme Court of the State of Washington for writ of habeas corpus and the Supreme Court of the State of Washington denied said application without opinion; that thereafter petitioners applied to the Supreme Court of the United States for certiorari and subsequent thereto the United States Supreme Court denied certiorari; that thereafter the said peti-

tioners filed petition for writ of habeas corpus in the above entitled court claiming that an illegally coerced confession of petitioner Gonzales was admitted in evidence to procure the conviction of Gonzales and the other petitioners, Giron and Coluya, and that [272] said use of the coerced confession was in violation of the due process clause of the Fourteenth Amendment."

2. Error is assigned to Finding of Fact No. 4, reading as follows:

"That on January 7th, 1950, at about the hour of 1:30 o'clock a. m. the said petitioner Gonzales was arrested in a taxicab without a warrant and was taken to the Seattle City Jail where he was questioned by police officers of the police force of the City of Seattle regarding the shooting of one Fidel Molina, which shooting, it was stated to him, had occurred about one hour or more previous to said petitioner's arrest; that said petitioner Gonzales was taken to the office of a police officer, Austin Seth, held, questioned for a lengthy period of time by two police officers of the Police Department of the City of Seattle, to-wit, officers Thomas and Ryan; that at said time and during the questioning the petitioner Gonzales was placed in a jail cell but was still not advised as to the reason for his detention; that he was removed subsequently from his cell and taken into a room in the police headquarters in the City of Seattle where he was questioned, threatened and abused by certain police officers of the City of Seattle; that he was advised during the period of his questioning that it would be better for him to make a statement and that he would do so if he knew what was good for him; that during the confinement of said petitioner he was not permitted to call anybody or to see anybody; he was not permitted to call a lawyer or to communicate with

his friends or to communicate with the Philippine Consul, though he frequently requested permission so to do; that likewise petitioner Gonzales was not afforded any hearing before a committing magistrate or justice of the peace during the period of his detention, although a magistrate was available during said time."

3. Error is assigned to Finding of Fact No. 5, reading as follows:

"That about five o'clock a. m. on January 7th, 1950, the said petitioner signed a statement which did not constitute a confession of petitioner's guilt; that petitioner Gonzales was further threatened and the interrogation was continued following the signing of the statement at five o'clock a. m. on January 7th, 1950; that during the progress of the questioning petitioner Gonzales was struck in the lower abdomen near the groin on several occasions, and was, on one occasion, thrown, shoved, struck or pushed over and against a part of the building and room in which Gonzales was confined and questioned; that a police officer of the City of Seattle threatened, during the interrogation, to kick the petitioner's 'God damn face'; that petitioner was abused and assaulted in particular by one certain police officer, one Thomas, and that at or about two o'clock a. m. on the morning of the 8th day of January, 1950, and following some twenty-four hours of interrogation, during which time petitioner Gonzales had been without sleep or rest, and during which time he was constantly questioned and abused by police officers of the police force of the City of Seattle, the said petitioner signed a statement implicating petitioner in the shooting of Fidel Molina and implicating the other petitioners, William Giron and Cecil Coluya."

4. Error is assigned to the italic portion of Finding of Fact No. 6, reading as follows:

> "That, petitioner signed the statement at two o'clock a. m. on January 8th, 1950, in the presence of two officers, Seth and Sprinkle, who did not abuse him, but were, in fact, sympathetic [274] and kind; *that, however, the said petitioner was in fear of further abuse, physical assault and mistreatment when he signed the statement at two o'clock a. m. on January 8th, 1950, and his said statement was signed as the result of fear of said petitioner Gonzales for the safety of his person and life and said statement or confession was the result of fear and was induced by the police brutality employed.*"

5. Error is assigned to Conclusion of Law No. 1, reading as follows:

> "That petitioner Albert Gonzales is being illegally detained by reason of the above and foregoing and specifically by reason of the fact that his conviction and confinement rests upon confession induced by physical abuse, coercive threats and brutality."

6. Error is assigned to the italic portion of Conclusion of Law No. 3, reading as follows:

> "*The petitioner Albert Gonzales is entitled to relief in this Court by virtue of the petition, affidavits and facts proved* [275] *in support thereof*, and petitioners William Giron and Cecil Coluya are not entitled to relief on the basis of the petition or the facts proved in support thereof."

7. Error is assigned to the United States Federal District Courts assuming jurisdiction for the purpose of trying de novo a question which was decided pursuant to state law and procedure, where the state law is not unconstitutional.

8. Error is assigned to the United States Federal District Court in deciding a question of fact which had been previously decided by a court of competent jurisdiction of the sovereign state of Washington.

9. Error is assigned to the United States Federal District Court in assuming that the supreme court of the State of Washington failed to consider a constitutional question required to be considered by state law.

ARGUMENT

Specification of Error No. 2

The court erred in making and entering Finding of Fact No. 2. The district court does not gain any additional hearing power over a cause merely because there was no hearing before the supreme court of the State of Washington on the merits of the cause. The statutes and the rules of the supreme court of the State of Washington clearly make provisions for appeals for criminal cases such as the one now before this honorable court. See Appeals in Criminal Cases, 18 Wn. (2d) 14-80, and chapter 4.88 and 10.73 RCW. In addition, the constitution of the State of Washington, Article I, section 10, Amendment 10, guarantees the right to appeal to all persons convicted of a crime. Clearly, this is a right which the state may not deny by affirmative action. The right to appeal is one which must be

taken advantage of by the individual defendant and is not something which the state forces on a person who may not wish to appeal. In the present case there is no contention that the State of Washington ever denied the appellee the right to appeal. In fact, he did appeal. However, his counsel failed to perfect the appeal as required by law and it was subsequently dismissed pursuant to the rules of the supreme court of the State of Washington referred to previously herein. It is submitted that where, as here, there has been no discriminatory denial of appeal to defendants in the original state court proceedings, jurisdiction is not granted to the federal district court on habeas corpus to hear and determine a question which is, and should very properly be, raised on an appeal. Any other conclusion, of course, is clearly an invitation for other defendants in criminal cases to do what appellee Gonzales did here: that is, to deliberately or otherwise fail to perfect his appeal when he had the opportunity to do so, thus preventing the state supreme court from reviewing the case on the merits; and then, later when witnesses have died or disappeared, go to the federal courts using habeas corpus as a substitute for an appeal. Clearly, this is an anomaly and a complete distortion of constitutional principles and theories. Thus, where it is shown and demonstrated that the only basis for a constitutional denial is that error was committed in the trial court from which no appeal was taken, does not supply the jurisdiction which the federal district court could not otherwise acquire.

Specifications of Error Nos. 4, 5, 6

The court erred in making and entering Findings of Fact Nos. 4, 5 and 6 and the conclusions of law based thereon, namely Conclusions Nos. 1 and 3. Because of the interrelation of the Findings of Fact Nos. 4, 5 and 6 and Conclusions of Law Nos. 1 and 3 based thereon respondent deems it best to make the argument in support of these errors as a whole rather than taking each point separately.

As related in the Statement of the Case, the appellee and his co-petitioners were charged jointly on January 9, 1950, by information filed in the superior court of King County for the State of Washington, Criminal Cause No. 25721. Thereafter, they pleaded not guilty and a trial followed. The result of the trial was the conviction of each of the defendants of the crime of murder in the first degree (Tr. 31 and Ex. 3, 4, 5, and 6). Appellee and the co-defendants gave notice of appeal but nothing was done to perfect the appeal and it was eventually dismissed by the supreme court of the State of Washington for lack of prosecution (Tr. 232).

In order for the order of the Honorable Sam M. Driver to stand, there certainly must be findings of fact on which to base such an order. In this case there are obvious discrepancies in the findings of fact which findings are not supported by the evidence presented to the court. These obvious discrepancies appear in Findings of Fact Nos. 4, 5 and 6. The findings are set out in detail under the assignments

of error and will not be repeated here. It is sufficient to point out that appellee alleged in his testimony before the court that the only officer who beat him or in any way abused him was Officer Kenneth Thomas, and that this beating apparently occurred some five minutes after his arrival at the police station (Tr. 73, 77 and 78). While there were some references made to continued beatings it is submitted that none of this was testified to squarely on direct examination and the only pertinent testimony of a beating was brought out on cross-examination by respondent's attorney at which time the only person who had anything to do with the beating administered to Gonzales was stated to be Officer Thomas, all of which occurred approximately five minutes after Gonzales' arrival at the police station or about 1:45 a. m. the morning of January 7, 1950. Yet, it is noted that the testimony of Officer Thomas is to the effect that the first and only time that he saw the appellee, Gonzales, was at approximately 3:00 a. m. on the morning of January 7, 1950, at which time, together with Officer Ryan, he brought Gonzales from a cell in the jail down to the office of Sgt. Paul Foster in charge of homicide (Tr. 110). It is also important to note that while Gonzales testified that he had been beaten by Thomas five minutes after he was brought to the police station, the uncontradicted testimony of Officers Thomas and Ryan further indicates that at the time of the shooting and for some interval thereafter, they were in the north end of the city on patrol in a police car and did not arrive

at the police station until some time after Gonzales was arrested and placed in a cell. Their assignment to the case, if it may be called an assignment, was actually around 3:00 a. m. on January 7, 1950 (Tr. 102). Then at the request of Sgt. Paul Foster, they brought appellee from his cell to Sgt. Foster's office and spent, at the most, not over five minutes with him, this being the amount of time it took to bring him from the cell to Sgt. Foster's interrogation room (Tr. 103 and 111). In respondent's Exhibit No. 8, page 10, on examination by the prosecuting attorney, Sgt. Foster testified that as far as he knew at no time did Officer Thomas talk to the appellee or question him but that in fact he, Sgt. Paul Foster, interrogated him and took the first statement (Exhibit 1). Finding of Fact No. 4 also states that Gonzales was originally taken to the office of police officer Austin Seth. There is not one single bit of evidence to support this. In fact, Gonzales was taken to the office of Sgt. Paul Foster as previously stated. In addition, there certainly is no evidence in the record of continued questioning and certainly no evidence of any further beatings. Admittedly, during the interrogation by Officers Seth and Sprinkle, Gonzales was never abused or threatened in any way. At the very best, appellee testified as to the so-called continued questioning as follows (Tr. 49):

"Q All right. What did they do then?

"A Well, they said, 'You go downstairs,' he said. So they took me down in my cell.

"Q In your cell?

"A While I was in my cell, I started—I stay only about five or ten minutes, they took me up.

"Q How long did this keep up?

"A Oh, I couldn't recall, sir, because they kept on coming and picking me up every five or ten minutes.

"Q They were coming and bringing you out every five or ten minutes?

"A Yes, sir."

And, as has been previously pointed out, Gonzales never testified that he was beaten at any time following the alleged initial beating. On page 81 of the transcript he testified as follows:

"Q —were you again beaten or threatened or abused?

"A No, not exactly, sir.

"Q Not exactly. Well, let me ask you this: Was there any force at five o'clock to prompt you or to force you to sign this paper?

"A Yes, Sergeant Ryan just tole me to sign it, sir, and I cannot say no.

"Q You say he told you to sign; is that all he said, just sign this?

"A He stated first—

"Q Pardon?

"A I hesitated at first, but I might as well sign it, so I have to sign it, I cannot argue with officers.

"Q Did he hit you or threaten you in any way?

"A Well, of course, the sound of his voice, sir, I am afraid of that, see."

Again, in Finding of Fact No. 4 there is a finding to the effect that appellee was not afforded a hearing before a committing magistrate and justice of the peace during his detention although a magistrate was available during said time. It is respectfully submitted that there is no evidence in the record and no evidence any place else that a magistrate or justice of the peace was available for the purpose of holding a magistrate's hearing during the detention period which began at approximately 1:45 a. m., January 7, 1950, and ended Monday, July 9, 1950, at which time an information charging appellee with first degree murder was filed. The only evidence offered with respect to this was the statement of counsel representing appellee that so far as he knew, there was one available. It is as fair for counsel for appellant to state that there was none available on a Saturday or Sunday for that purpose or for any other purpose for that matter. Certainly, counsel for appellee had the burden of proof and his statement does not constitute evidence upon which a finding of fact can be based.

With respect to Finding of Fact No. 5, it is perfectly obvious that since the only testimony of Gonzales concerning his beating was that he was beaten five minutes after he was brought to the jail, completely belies the finding that following the taking of the statement at 5:00 o'clock a. m. on January 7, 1950, he was further beaten and abused. As a matter of fact, about the only thing that either counsel was able to get out of the appellee during the exami-

nation was to the effect that immediately following the taking of the statement at 5:00 a. m. January 7, 1950, he had been taken for a ride by some of the other police officers to point out one Giron's house. (Tr. 48) Certainly this is a far cry from the finding of fact previously referred to that Gonzales was struck in the lower abdomen near the groin on several occasions and was on one occasion thrown, shoved, struck or pushed over and against a part of the building and room. As has been previously mentioned with respect to finding of fact No. 4, it was stated that appellee was taken to the office of Sgt. Austin Seth and interrogated. However, the testimony of Sgt. Seth which is completely undisputed and there is no record of any other fact in the case, was that Sgts. Seth and Sprinkle were assigned to the case at 10:30 p. m. on January 7, 1950, (Tr. 177) which was, in fact, the first time that Sprinkle and Seth had seen this petitioner in connection with this case.

In assigning error to Finding of Fact No. 6 it must be brought out that the finding is certainly completely inconsistent. The appellant has no quarrel with the finding so far as it embraces the fact that Sgt. Seth and Sgt. Sprinkle did not abuse the appellee but were in fact sympathetic and kind. However, in so far as it is a finding that the only reason Gonzales confessed to this crime at 2:10 a. m. on January 8, 1950, or approximately 24½ hours after his arrest was because he was in fear for the safety of his person and his life and the statement

was the result of fear and was induced by police brutality, is not a logical sequence of events. A cursory reading of the transcript of the wire recording, beginning on page 146 of the transcript and running through 171 of the transcript discloses most of the conversation between the appellee and officers Seth and Sprinkle and will show that certainly Gonzales was not afraid or in fear of anyone at that time. A careful reading of it discloses that Gonzales actually felt that he was with friends and it would just be a much better thing for him and for everyone concerned if he did not see fit to tell any more lies, but told the truth. It appears to be an exculpatory statement by Gonzales rather than a statement of one in fear of life and limb. It is to be remembered that there is no evidence of any beating following the first five minutes of his arrival at the police station, to which Gonzales testified or that he signed a statement (Exhibit No. 1) approximately 4 hours after this is alleged to have occurred. In this statement he did not admit anything and certainly denied any complicity with anyone in connection with the shooting of Fidel Molina. Then, 20 hours later, he signed a statement before two kind, sympathetic police officers. Where is the fear of life and limb? It just does not exist. As a matter of fact, in signing the first statement, about all that Gonzales testified to as the reason for signing it was that he was afraid of the tone of the officer's voice. With particular reference to the testimony of Gonzales he stated directly that Sgts. Seth and Sprinkle alternated in

questioning him. It is clearly demonstrated, without any testimony whatsoever, in the transcript of the reporter, pages 149-153, that all through the questioning both Seth and Sprinkle were present in the room, together with Gonzales. It is true that Gonzales mentioned to Seth that he had been beaten. Seth took pictures of Gonzales in connection with this (Tr. 180-181) and they apparently showed no evidence of any beating. In addition there was a lineup of police for the purpose of having Gonzales identify his abusers (Tr. 182). Ryan and Thomas were not in that lineup. However, they did testify during the trial and it is to be noted that Thomas testified before Gonzales ever took the stand and yet Gonzales, upon taking the stand, stated that the person who had beaten him had not been in the courtroom and had not testified at the trial. Exhibit 8. However, later, Thomas was specifically brought in while Gonzales was testifying and at that time Gonzales identified Thomas as the person who had beaten him and again, of course, Gonzales stated that he knew Thomas by name because his attorney told him the name. Yet, as previously stated, he did not recognize him when he was on the stand testifying on behalf of the state (Ex. 8, page 23). It must go without saying, of course, that both officers Thomas and Ryan denied having ever abused, threatened or struck the appellee in any way. (Tr. 94, 109 and Ex. 8.) It is urged that there is no evidence in the record and there was none before the Honorable Sam M. Driver to support the findings

of fact which were entered and, of course, where those findings of fact have been demonstrated to be in error, any conclusions of law based thereon must, of necessity, be in error.

SPECIFICATIONS OF ERROR NOS. 6, 7, 8

Specifications of Error Nos. 6, 7 and 8 will be presented together because of their interrelation with each other. The appellant has not contended, and makes no contention here, that it is necessary to perfect an appeal in order to give rise to the right guaranteed by the constitution for a writ of habeas corpus. Nor, by the same token, does the appellant contend that the writ of habeas corpus is unavailable where there has not been an appeal. However, it must be remembered that the right of habeas corpus embodied in the federal code, namely Title 28, § 2254 U. S. C. A. and RCW 7.36.010 of the Washington Code, gives the right to a prisoner held in custody, pursuant to statute, to have a determination made on habeas corpus of whether or not a constitutional guarantee was denied to him. *Wade v. Mayo*, 334 U. S. 672 (1948); *Brown v. Allen*, 344 U. S. 443 (1953); *U. S. v. Baldi*, 198 F. (2d) 113. It appears that the appellee in this case, Albert Gonzales, did exhaust those remedies available to him under our statutes for habeas corpus providing extraordinary procedures for review after conviction. In the state courts his applications for habeas corpus were denied because there had not been in fact any denial of due process of law or any other guarantee of the con-

stitution of either the United States or the State of Washington.

It is respectfully submitted that the question presented to the United States District Court by the petitioner in this case was solely a question of fact. It is conceded that the matter of coercion in the procurement of Gonzales' confession was submitted to the jury in a state court trial under a proper instruction from the court pursuant to RCW 10.58.030 in accordance with the prescribed Washington procedure as is proper where the claim of coercion is in actual dispute (Tr. 219). In *State v. Meyer*, 37 Wn. (2d) 759, at 770, our supreme court said:

> "We have decided that it is for the jury to determine whether a confession was obtained under the influence of fear produced by threats. *State v. Barker*, 56 Wash. 510, 106 Pac. 133; *State v. Wilson*, 68 Wash. 464, 123 Pac. 795; *State v. Kelch*, 95 Wash. 277, 163 Pac. 757; *State v. Van Brunt*, 22 Wn. (2d) 103, 154 Pac. 606. We pointed out in the *Barker* case that if it should appear to the court that a confession was made under the influence of fear produced by threats, it was its duty to exclude the evidence, and that it was proper for the court to hear the evidence relating to duress and decide upon the admissibility of such evidence. We held that there was nothing in the statute requiring such evidence to be taken without the presence of the jury and that there need not be two examinations of the witnesses, one before the court and the other with the jury present. A situation may arise in the trial of a case where the court might, in its discretion, make some inquiry in the absence of the jury with reference to how a confession was obtained, but the theory

> of our decisions is that the court is not required by the statute to do so."

The jury in the state court proceedings in which the appellee was involved heard both the uncorroborated testimony of Gonzales that coercion had been employed and the testimony of police officers that Gonzales had never been harmed or threatened. There was substantial evidence aside from and in addition to the confession. There is no provision in the Washington law for a special verdict in a criminal proceedings to determine whether or not the confession was coerced before a verdict of guilty. The jury found Gonzales, the appellee here, guilty by its general verdict. The procedure employed by the trial court in submitting the factual question presented by the confession to the jury is fully constitutional. *Stein v. New York*, 346 U. S. 156 (1953) and cases cited. Further, a confession is not necessarily inadmissible even though obtained six days after the defendant's arrest and without his having been taken before a justice of the peace as a committing magistrate. In *State v. Winters*, 39 Wn. (2d) 545, at page 549, our court said:

> "[5] The appellant contends that the confession was not admissible, because it was obtained six days after his arrest and without his having been taken before a justice of the peace, as a committing magistrate, in the meantime. He cites the statutes pertaining to procedure before a justice of the peace. It is, of course, somewhat similar to the procedure before United States commissioners, as provided for in Federal Rule 5(a) of the Federal Rules of

> Criminal Procedure. He then cites *McNabb v. United States*, 318 U. S. 322, 87 L. Ed. 819, 63 S. Ct. 608, and *Upshaw v. United States*, 335 U. S. 410, 93 L. Ed. 100, 69 S. Ct. 170, to the effect that such a delay in bringing a prisoner before the commissioner makes a confession inadmissible. These cases are not in point. This is neither a Federal case nor a proceeding before a justice of the peace. The cases relied upon are not predicated upon either Washington state or Federal constitutional provisions, but only on a rule of procedure. There is no constitutional or statutory provision in the state of Washington having to do with the use of confessions as evidence against a defendant in a criminal trial, except Rem. Rev. Stat. § 2151. Under the purview of the statute it was not error to admit the confession."

It has already been noted that the appellee was arrested at approximately 12:30 on a Saturday morning and was charged with the crime of murder of the first degree the following Monday morning. Confessions are admissible in the State of Washington and certainly it is a question for the jury under the proper instructions. In *State v. Van Brunt*, 22 Wn. (2d) 103, at page 108, our court had this to say:

> "[2] In this case there was a controversy over the question of threats and inducements, and the court gave the following instruction:
>
> " 'By the law of this State the confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him except when made under the influence of fear produced by threats.
>
> " 'You are instructed that confessions and admissions are to be received with great caution. You are instructed, however, that if, upon the

whole testimony, you are satisfied that any confession or admissions were made by a defendant, and are also satisfied that the same were voluntary upon the part of such defendant, then the same shall be considered by you as evidence in this case. If otherwise, they shall not be considered as evidence.

" 'A confession or admission by a defendant is voluntary if at the time of making it he is not under the influence of fear produced by threats; that is, if he may or may not speak, as he choses.

" 'A confession made under inducement is not sufficient to warrant a conviction without corroborating testimony. You are instructed that corroboration may be either by direct testimony or by circumstantial evidence. . . .' "

It follows that appellee did not show a denial of due process as guaranteed by the Fourteenth Amendment. Title 28 U. S. C .A., § 2241, provides as relevant to the present case that

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

" * * * * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * * "

We earnestly urge that factual review is not authorized by this provision. That is, a federal district court judge sitting by himself may not decide a question of fact which has been properly presented to a jury in a court of competent jurisdiction in the State of Washington notwithstanding that that district judge may feel the jury came out wrong. Further, it is submitted there is no authority whatsoever for a federal court to review de novo any factual

question properly submitted to the trial court, but that the federal court to whom the application is made can only exercise at most a purely revisory appellate jurisdiction as to errors of federal law only. See *Taylor v. Alabama*, 335 U. S. 252, at 262. In *Schechtman v. Foster*, 172 F. (2d) 339 (CCA 2d 1949) Judge Learned Hand wrote the opinion of the court in a case where the petitioner sought habeas corpus on the ground that perjured testimony had been used to secure his conviction in the state court. The petitioner had previously made numerous unsuccessful attempts by various writs in state courts to have his conviction reviewed. In affirming a denial of the writ by the United States District Court, Judge Hand said:

> "* * * It must be remembered that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. *If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights.* * * *" (Emphasis supplied.)

In *Odell v. Hudspeth*, 189 F. (2d) 300 [CCA 10th 1951], a case arising in Kansas, the court said at page 301:

> " * * * To authorize relief to a state prisoner under section 2241, the deprivation of constitutional rights must be such as to render the judgment void. Mere errors in proceedings by a state court in the exercise of its jurisdiction over a case properly before it, however, serious, cannot be reviewed by habeas corpus. Habeas corpus proceedings may not be employed as a substitute for appeal. *Frank v. Mangum*, 237 U. S. 309, 326, 35 S. Ct. 582, 59 L. Ed. 969; *Maxwell v. Hudspeth*, 10 Cir. 175 F. 2d 318, certiorari denied 338 U. S. 834, 70 S. Ct. 39; *Garrison v. Hunter*, 10 Cir. 149 F. 2d 844, *Rosenhoover v. Hudspeth*, 10 Cir. 112 F. 2d 667. Federal courts will intervene only when the fundamental rights of the prisoner have been denied and taken from him arbitrarily and a trial in accordance with the established law of the state in a court of competent jurisdiction has not been afforded. * * * "

See also *Graham v. Squire*, 132 F. (2d) 681 (CCA 9th 1942); *Brach v. Hudspeth*, 111 F. (2d) 447 (CCA 10th, 1940); *Leonard v. Hudspeth*, 112 F. (2d) 121 (CCA 10th, 1940).

Assuming without admitting that a factual review is authorized in the circumstances, we respectfully submit that the United States District Court can have no greater power in this area than the United States supreme court could assume on direct appeal. The limitations upon such review by the latter court are clearly set out in *Stein v. New York*, *supra*, on pages 180 and 182 in the following language:

> "Petitioners' argument here essentially is that the conclusions of the New York judges

> and jurors are mistaken and that by re-weighing the same evidence we, as a super-jury, should find that the confessions were coerced. This misapprehends our function and scope of review, a misconception which may be shared by some state courts * * *
>
> "* * * * * * * *
>
> "* * * When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded fact, decisive respect. [Citing cases.]"

In the present case there is no such impeachment by conceded facts such as would warrant inquiry into the factual determination of the jury. The only question is whether the word of Gonzales is to be believed as against the word of the officers. At least this was the only question presented to the Honorable Sam M. Driver. Judge Driver, believing Gonzales over the police officers, found that as a matter of fact the confession was coerced and that being coerced, Gonzales was denied due process of law in being convicted. In connection with the *Stein* case it might possibly be argued that because Gonzales did not secure review by appeal, as did the defendants in the *Stein* case, but rather employed habeas corpus by the state courts for that purpose, the issue had not been fairly reviewed under the rules above quoted. Aside from this it is submitted the cases are identical. The petitioners did present the identical issue to the Washington State Supreme Court by habeas corpus. The Washington law requires the

court to consider a constitutional question when so presented to determine whether or not a petitioner has been denied any right guaranteed by the constitution of the United States. RCW 7.36.140 provides as follows:

> "In the consideration of any petition for a writ of *habeas corpus* by the supreme court, whether in an original proceeding or upon an appeal, if any federal question shall be presented by the pleadings, it shall be the duty of the supreme court to determine in its opinion whether or not the petitioner has been denied a right guaranteed by the Constitution of the United States."

The supreme court of Washington following its usual procedure denied the application for habeas corpus without opinion. It must be assumed that the state supreme court complied with the statute and denied the application because there was, in fact, no showing of constitutional deprivation. *Schechtman v. Foster*, *supra*. The judgment in the state trial court was rendered in an action by and in the name of the state and against the appellant for a public wrong. The proceeding instituted by the petitioner is basically a collateral attack on the judgment of the trial court and clearly it should not succeed.

In *Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. Ed. 1192, there were conceded facts and the supreme court stated in that case that:

> "We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom

> by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.
>
> "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. * * *"

Certainly no one can argue against logic such as this. However, in the instant case there are no uncontradicted facts upon which to base the decision. First Judge Driver had to weigh the uncorroborated testimony of appellee, Gonzales, against that of three Seattle police officers. Then he had to make a decision as to who was telling the truth. After making the decision he found as a matter of fact the confession was coerced. All this, after the same issue had been presented to a jury of the appellee's peers in the Washington trial court. In *Palakiko v. Harper*, 13, 394, Dec. 10th, 1953, this court had this to say in connection with due process:

> "The reason for the rule stated in the *Rosenberg* case, *supra*, is, we think, that while, as a matter of procedural due process, a person accused of crime must be given a fair opportunity to try the question whether he has been denied due process of law through the procure-

ment of a coerced confession, yet he is not entitled to more, or to repeated trials of that question. Thus in *Stein v. New York*, 346 U. S. 156, 179, where the question of the voluntariness of confessions was submitted to a jury, the court asked the question: 'Was it unconstitutional if these confessions were used as the basis of conviction?' And in answering it said (page 182): 'When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect.' In a similar decision the Court of Appeals for the Third Circuit, (*United States v. Baldi*, 198 F. 2d 113, 118), quoted from Mr. Justice Reed's opinion in *Lyons v. Oklahoma*, 322 U. S. 596, 605, the following: 'The Fourteenth Amendment does not provide review of mere error in jury verdicts, even though the error concerns the voluntary character of a confession.' "

And, again, in the *Palakiko* case this court said:

> "In *United States v. Rosenberg*, (2 cir.), 200 F. 2d 666, 668, cert. den. 345 U. S. 965, 1003, the court, speaking of the remedy under § 2255, Title 28, and comparing it to the writ of habeas corpus, said: 'It, like that writ, "cannot ordinarily be used in lieu of appeal to correct errors committed in course of a trial *even though such errors relate to constitutional rights.*" ' (Emphasis added.)"

To further illustrate the feeling of the United States Supreme Court with regard to the federal court reviewing and deciding a question of fact already decided in a state court, in *Watts v. Indiana*, 338 U. S. 49, 93 L. Ed. 1801, our supreme court said:

> "In the application of so embracing a con-

> stitutional concept as 'due process,' it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. * * * "

CONCLUSION

In conclusion, it is respectfully submitted that appellant has shown that the findings of fact to which he makes exceptions are not supported by the record. Thus the conclusions of law and order based thereon must fall. Assuming that the federal district court had the right under the federal statutes to make an independent de novo factual examination, the result must be based on correct findings of fact. It is further appellant's position that it has been clearly demonstrated that the United States Federal District Court does not have the jurisdiction to dabble into questions of fact which have already been properly decided by a court of competent jurisdiction in a given state, and this, notwithstanding that there has not been any review in the State Supreme Court. It has been pointed out and needs no citations that a habeas corpus may not

be used as a writ of error or as an appeal. And where a prisoner of a state has not used the remedy which is available to him, that is, the remedy of appeal, he does not thereby give his application any greater stature than it would have had there been an appeal. Certainly, the effect of his failure to appeal is the same as if it had been appealed and the trial court affirmed.

Appellant respectfully submits that the United States District Court's decision and order should be reversed.

Respectfully submitted,

DON EASTVOLD,
Attorney General,

CYRUS A. DIMMICK,
Assistant Attorney General,

Attorneys for Appellant.